

ROBERT A. DOANE

103 Prospect Street
Wakefield, MA 01880

robertdoane@rcn.com

Telephone 781.245.6577
Facsimile 888.712.2724

8 April 2015

Sent by Certified Mail

Regional Administrator
US Environmental Protection Agency
5 Post Office Square – Suite 100
Boston, MA 02109-3912

RECEIVED
APR 13 2015
OFFICE OF THE REGIONAL ADMINISTRATOR

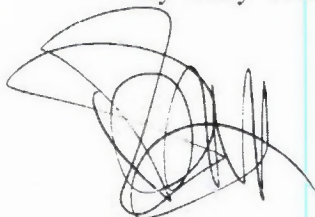
RE: Notice of 90-Day Demand under Clean and Safe Drinking Water Acts

Dear Sir or Madam:

Please see attached 90-Day Demand under Clean and Safe Drinking water Acts dated 8 April 2015, sent to the Prospect Hill Manor Condo Trust by certified mail on this same day.

This notice is being sent to you as required under the Acts. Please confirm receipt of the attached letter by returning the second copy of this letter stamped with date of your receipt, and initialed by the appropriate officer. A self addressed stamped envelope has been included for that purpose. In addition, in the event your office intends to take action against the Prospect Hill Manor Condo Trust to compel compliance, please indicate that in a letter to me along with what action will be taken.

Very Truly Yours,

A handwritten signature in black ink, appearing to be 'Robert A. Doane', with a large, stylized flourish at the end.

Robert A. Doane
Trustee of the LCR Realty Trust

ROBERT A. DOANE

103 Prospect Street
Wakefield, MA 01880

robertdoane@rcn.com

Telephone 781.245.6577
Facsimile 888.712.2724

8 April 2015

Sent by Certified Mail

Regional Administrator
US Environmental Protection Agency
5 Post Office Square – Suite 100
Boston, MA 02109-3912


RE: Notice of 90-Day Demand under Clean and Safe Drinking Water Acts

Dear Sir or Madam:

Please see attached 90-Day Demand under Clean and Safe Drinking water Acts dated 8 April 2015, sent to the Prospect Hill Manor Condo Trust by certified mail on this same day.

This notice is being sent to you as required under the Acts. Please confirm receipt of the attached letter by returning the second copy of this letter stamped with date of your receipt, and initialed by the appropriate officer. A self addressed stamped envelope has been included for that purpose. In addition, in the event your office intends to take action against the Prospect Hill Manor Condo Trust to compel compliance, please indicate that in a letter to me along with what action will be taken.

Very Truly Yours,

A handwritten signature in black ink, appearing to be 'Robert A. Doane', with a large, stylized flourish at the end.

Robert A. Doane
Trustee of the LCR Realty Trust

ROBERT A. DOANE

103 Prospect Street
Wakefield, MA 01880

robertdoane@rcn.com

Telephone 781.245.6577
Facsimile 888.712.2724

8 April 2015

Sent by Certified Mail

Trustees
Prospect Hill Manor Condominium Trust
8 Parker Road
Wakefield, MA 01880

RE: Breach of Contract – Nullification of Release of Claims
Renewed 90-Day Demand under Clean and Safe Drinking water Acts

Trustees:

The Trustees of the Prospect Hill Manor Condominium Trust (“Condo Trustees” or “Condo Trust”) failed to carry out conditions of the written contract entitled “Release Of All Claims,” dated 18 March, 2013 (“Agreement”), between the Trustees and myself as Trustee of the property located at 103 Prospect Street Wakefield, Massachusetts (“LCR Realty Trust Property”). Particularly, the Condo Trustees have not maintained the storm management system as required by the Town of Wakefield’s September 17, 2004 comprehensive permit in accordance with paragraph five of the Agreement. Since this is a breach of a material condition of the Agreement, the release contained therein is no longer effective as of the date of the breach.¹ The Condo Trust and its Trustees are therefore liable for trespass, nuisance, and damages arising from intrusion of water into the LCR Realty Trust Property since the breach, and contamination of soil and ground water resulting from salt and other materials entering into the storm management system and into the LCR Realty Trust Property.

As you may recall, after the Agreement was signed and it was discovered the Condo Trust continued to be out of compliance with state and federal law with respect to the operation of a series of Class V Injection wells located immediately adjacent to the LCR Realty Trust Property, a demand for compliance was then made.² The letter explained the Condo Trust’s wells allow contaminants to enter into the ground water, adversely effecting, and posing a continuous threat to, the environment and the health of the inhabitants of the LCR Trust Property, among others. The Condo Trust’s attorney responded stating the Agreement, which contained a release in consideration of the

¹ See e.g., *Astra USA, Inc. v. Bildman*, 19 Mass. L. Rptr. No. 16, 368 (MA 5/4/2005), 19 Mass. L. Rptr. No. 16, 368 (MA, 2005) (“It is well established that a material breach of contract by one party excuses the other

² Under applicable EPA regulations (40 CFR 144.3), a Class V Injection Well (Well Code 5D2) is any drainage well used to receive storm water runoff from paved areas, including parking lots, streets, residential subdivisions, building roofs, highways, etc.

Certified Mail: 7007 3020 0002 7813 5982

Condo Trust's specific compliance with the conditions of the comprehensive permit requiring the catch basin be cleaned three times per year, barred such claims. Although the allegation of such a bar was contested as against public policy, the Condo Trustees agreed, through their attorney, to confirm the system was operating properly, thus since it appeared the Trustees were amenable to resolving the issue, a wait and see approach was opted for before considering further action.³ However, since the Condo Trust received the last letter, nothing was provided to show compliance with state and federal law, nor was information provided confirming the proper operation of the Condo Trust's storm management system. In fact, over the last two years, nothing materialized except for the Condo Trust's unsuccessful attempt to rescind the snow removal condition, another condition of the comprehensive permit. In fact, the Condo Trust has refused to clean the storm system as agreed and failed to remove snow in full compliance with the comprehensive permit, thus causing further exacerbation of the adverse effects to the LCR Realty Trust Property.

The Condo Trust is well aware that the condition of the Agreement requiring compliance with the comprehensive permit was an essential and inducing feature of the Agreement containing the release. The Condo Trust is fully aware that its failure to comply with those conditions would have consequences to the function and effectiveness of the storm management system not only causing the system to dysfunction but also causing pollutants to enter directly into the ground water. Indeed, because the Condo Trust was put on notice that the system violates state and federal law, yet thereafter ignored its obligations to become compliant, while simultaneously refusing to clean the system as required, the Condo Trust intentionally exacerbated the harmful effects to the LCR Realty Trust property and its inhabitants, and intentionally and knowingly violated state and federal law.⁴ Because of this, the Agreement's release is now, on that basis alone, against public policy. *See e.g., A.J. Properties, LLC v. Stanley Black & Decker, Inc.*, 989 F. Supp. 2d 156, 163 (D. Mass. 2013) (a release of liability for future harm caused intentionally, recklessly, or with gross negligence is unenforceable as against public policy.).

Accordingly, this letter demands compensation for damages caused as a proximate result of the Condo Trust's failure to properly maintain the storm drain management system, e.g., trespass, nuisance, and water containing pollutants to enter into the LCR Realty Trust Property, to the harm of the property and occupants, e.g., emotional distress and other adverse health related effects, all further causing substantial devaluation of the LCR Trust property. Doane seeks \$70,000 relating to damages to the LCR Trust Property, and \$30,000 relating to damages to his person and the unimpeded

³ The release would not bar a claim under the Clean or Safe Drinking Water Acts because such bar would be against public policy. *See e.g., Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 321, 662 N.E.2d 1015, 1017 (1996) (public interest in freedom of contract is sometimes outweighed by public policy, and in such cases the contract will not be enforced.).

⁴ What is particularly disturbing about the breach is the fact it was in the form of an explicit directive by the Condo Trust to the catch basin cleaning contractor – only a few weeks after the contract was signed – to only clean on a biannual basis, in violation of the comprehensive permit and the condition of the release.

ongoing threat of same.

This letter is also being sent by me as a party in interest and provides the Condo Trust with the required 90-day notice of intent to file a citizens suit under the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(1), and the Federal Safe Drinking Water Act ("SDWA") 42 U.S.C. § 300j-8(a)(1). Pursuant to same, this letter demands full and complete compliance with both state and federal law.

As the Condo Trustees are aware from the prior 90-day demand letter, between 2004 and 2005, 8 Parker Road, Wakefield Massachusetts, now the Prospect Hill Manor, underwent construction to refurbish an existing building into a multi-unit condominium complex. As part of that construction, trees were removed, fill was brought in, a retaining wall built, and a large parking lot added.⁵ To accommodate the additional runoff from added impervious area, a storm management system was built comprising of a catch basin wherefrom storm water is piped to a series of Class V Injection Wells that are within a few feet of the LCR Trust Property. In late 2006, the Condo Trust was put on notice that since the installation of the storm management system at 8 Parker Road, large amounts of water began to enter the basement of the structure at the LCR Trust Property, during and for a period after rain, and Doane expressed the belief that the Storm Drain Management System was responsible. Indeed, an engineer determined that "the post-development volume of storm water directed to the border between the Prospect Hill Manor Condominium and the Doane Property is substantially increased because of (1) the substantial increase in impervious area, (2) the discharge of all collected storm water to the infiltrators adjacent to this boarder, and (3) the removal of mitigating pervious surface area between the Doane Property boundary and the preexisting structure at 8 Parker Road." More particularly, the engineer states **"there has been a 12.5-fold increase in tributary impervious surface draining to the boarder at the Doane Property."** As noted earlier, according to the engineer, the amount of impervious area was underreported and is nearly twenty percent (890 sq. ft.) greater than that shown on the site plan. The engineer also states that "[a]ny failure to maintain the [storm drain management] system leading to the overflow may increase the problem [of flooding to the Plaintiff's property] due to the point discharge of storm water at the property line."

The Condo Trust has refused to remove snow in excess of four inches, as recently as this winter, in full compliance with the comprehensive permit, the removal of which would at least mitigate infiltration of water from rapid snowmelt and the need to repeatedly spread salt and other pollutants on the Condo Trust parking area, among other things.⁶ The Condo Trust has refused to clean the catch basin of the storm drain

⁵ The area proposed on the Revised Site Plan by the project sponsor was 5,600 sq. ft., whereas the actual impervious area built was 6,490 sq. ft. This discrepancy violates the conditions imposed by the Comprehensive Permit Decision (Comprehensive Permit Decision p. 3 ¶ 1, 2), and violates the Trust's compliance obligation under the Comprehensive Permit Decision, the Master Deed, and the Regulatory Agreement to which the Town of Wakefield is obligated to notify the DHCD.

⁶ The Condo Trust has submitted an engineer report to the Town of Wakefield alleging that stockpiling snow on the property would not have an adverse impact on drainage, however, in the context of the report provided by Doane's engineer, this Condo Trust's engineer report is believed to be entirely unsound and created in breach of those ethical standards required of engineers. Obviously, if the underlying storm

management system, intentionally violating the conditions of the comprehensive permit as well as the Agreement containing a release conditioned on same. Despite numerous letters and complaints, most recently a 90-day demand letter sent pursuant to the Clean and Safe Drinking Water Acts, the Condo Trust has refused to stop the flow of water into an illegal injection well, and refused to comply with those conditions that would prevent or mitigate the infiltration of a large amount of water into the LCR Trust Property, and by so doing, has caused exacerbation of the harms and damages to the LCR Trust Property and its occupants, as well as to the broader public.

As the Condo Trust is now well aware, the Safe Drinking Water Act requires that the EPA protect underground sources of drinking water (“USDW”) from injection activities. The EPA has set minimum standards to address the threats posed by all injection wells. Storm water injection is a concern because storm water may contain sediment, nutrients, metals, salts, microorganisms, fertilizers, pesticides, petroleum, and other organic compounds that could harm USDW. The Clean Water Act prohibits the injection and discharge of storm water that is or has the potential of carrying pollutants from a point source to the waters of the United States except pursuant to and in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit. It is a violation of the CWA to build or operate a Class V Injection well without first submitting inventory information to the permitting authority. The Massachusetts Department of Environmental Protection (“MassDEP”) is the regulating authority providing standards and limitations under the CWA in Massachusetts. The Underground Injection Control (“UIC”) program is a federal program under the SDWA managed in Massachusetts by MassDEP. The MassDEP’s UIC Program has more stringent standards – which are detailed below – than the CWA, regulating discharges of fluids having the potential to contaminate groundwater (310 CMR 27.00), and mandates “Best Management Practices” to which compliance is required for the design and construction of Injection Wells, including certain requirements with regards to setback, infiltration, and pollution control. Even further, the MassDEP applies more stringent standards pursuant to its authority under the Wetlands Protection Act, M.G.L. c. 131, § 40, and the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26-53. The revised Storm Water Management Standards have been incorporated in the Wetlands Protection Act Regulations, 310 CMR 10.05(6)(k) and the Water Quality Certification Regulations, 314 CMR 9.06(6)(a).

On a continuing and ongoing basis, despite repeated complaints regarding discharge from the Condo Trust’s Class V Injection wells, the Condo Trust continued to discharge storm water carrying pollutants without having followed the requirements mandated by the CWA, the SDWA, or the stringent standards required under the MassDEP. The Condo Trust has caused, and continues to cause, the discharge of pollutants into the LCR Trust Property, within and into a wetland adjacent to the well, and into waters of the United States, all to the detriment of Doane, the occupants of the LCR Realty Trust Property and the general public. The Condo Trust has failed to take any investigative, preventative, or remedial actions. To date, the Injection Wells operate

management system is deficient, which Doane’s sound report states, the failure to remove snow would exacerbate what are already adverse effects to the LCR Realty Trust Property caused by the storm system.

illegally, unhindered, on a continuous and ongoing basis, without proper maintenance, and as a convenient place to dump unwanted materials.⁷ The above facts make a prima facie case that the Condo Trust has intentionally violated and continues to intentionally violate not only the comprehensive permit and the release and settlement agreement, but also, the CWA, the SDWA, the Massachusetts Wetlands Protection Act, G.L. c. 131 § 40, the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, G.L. c. 21, § 43(2), and various provisions of the CMR.

Doane and the occupants of the LCR Realty Trust are concerned with water quality, and proper compliance with state and federal law. The Condo Trust's Class V Injection wells continue to pose an unabated threat to Doane and the occupants of the LCR Realty Trust and the general public, and the use of these wells violate state and federal law. As the structure on the LCR Realty Trust Property is located down gradient and immediately adjacent to the Condo Trust property, and the Injection Wells are located within a few feet, and along the entire length of the LCR Realty Trust property line, this demand letter is submitted by Doane in his capacity as a person harmed by the discharges alleged herein and as a party in interest who has standing to file a Citizens Suit under the CWA and the SDWA.

The Condo Trust cannot continue to use the Class V Injection Well's on the Condo Trust property, as you have been negligent in maintaining the wells, they are causing harm to the environment, and they adversely effect the health of persons. The wells must be sealed immediately in conformance with state and federal law. I Therefore demand immediate compliance with 310 CMR 27.10, requiring the closure of the Class V Injection wells on the Condo Trust property, and further, I demand performance of all remedial actions required pursuant to 310 CMR 27.10.⁸

In particular, in the context of the more stringent standards in Massachusetts, the Condo Trust never registered its Class V Injection wells before operation, as required by 310 CMR 27.08, nor have they been registered since receiving a 90-day demand letter demanding compliance over a year ago. The Condo Trust continues to be in violation of 310 CMR 27.04, and therefore the Clean and Safe Drinking Water Acts.

The CMR specifically defines a "Class V Injection well" as "wells used to drain storm runoff into soil or bedrock." 310 CMR 27.05(2)(c). Clearly, the Condo Trust's storm management system, which comprises of pipes leading from a catch basin and underground into a series of underground wells, are in fact "Class V Injection wells," as the MassDEP has confirmed this fact by a review of the site plan. A person may only construct, operate or maintain a Class V Well in compliance with 310 CMR 27.00 and

⁷ On August 26, 2010, after observing several days of construction activities on the roof of the building at the Defendants property, persons were observed, and photographed, dumping materials from activities on the roof of Defendant's building into the catch basin that leads to the Injection Well.

⁸ Please be advised that the previously extended offer to permit a no cost easement through the LCR Trust property to accommodate piping the storm water to the Prospect Street catch basin, an offer made to your attorney, is hereby withdrawn.

other applicable regulations and statutes, including but not limited to M.G.L. c. 21 s. 43; the Massachusetts Groundwater Discharge Permit Program, 314 CMR 5.00; the State Environmental Code, Title 5, 310 CMR 15.000; and the Massachusetts Uniform Plumbing Code, 248 CMR 2.00. *See generally*, 310 CMR 27.05.

Registration of a Class V Injection well is required before use, specifically, “[e]ach owner or operator of a Class V Injection well first put into use after September 13, 2002 shall register that injection well with the Department, on a form to be supplied by the Department, prior to commencing any injection, except as noted in 310 CMR 27.07.” *See* 310 CMR 27.08(2).⁹ Even if registration was attempted, according to the MassDEP, it would not permit these wells to operate as designed because they do not meet best practices design requirements, nor do they meet setback requirements from a property line. The Standard Design Requirements for Shallow UIC Class V Injection Wells “. . . must conform to . . . minimum setback distances . . .,” which is ten feet to a “property line,” and 15 feet from a “downhill slope,” in particular:

The setback distance shall be measured from a naturally-occurring downhill slope which is not steeper than 3:1 (horizontal:vertical). A minimum 15-foot horizontal separation distance shall be provided between the top of the infiltration structure (i.e. top of drainage pipe or leaching chamber or dry well, etc.) and the adjacent downhill slope. For a system located in an area with any adjacent naturally occurring downhill slope steeper than 3:1, slope stabilization shall be provided in accordance with best engineering practice which may include construction of a concrete retaining wall designed by a Massachusetts Licensed Professional Engineer (PE)

See, <http://www.mass.gov/eca/agencies/massdep/water/drinking/standard-design-requirements-for-shallow-uic-class-v-.html>.

The Condo Trust’s Class V Injection wells do not conform to mandated design requirements, they are not registered, they are operating illegally, and they are polluting the LCR Realty Trust Property and the broader environment.

Prohibited activities are defined by 310 CMR 27.04, the relevant portion of which states that “[n]o person shall inject or cause to be injected any fluid into a Class V Well where that injection may cause or allow the movement of fluid containing any pollutant into underground sources of drinking water, and the presence of that pollutant cases or is likely to cause a violation of the Massachusetts Drinking Water Regulations, 310 CMR 22.00, or which in the opinion of the Department adversely affects or may adversely affect the health of persons.” *Id.* A “pollutant,” is any “sediment, nutrient, metals, salts, fertilizers, pesticides, and microorganisms, and which are considered to cause a violation of 310 CMR 22.00.

⁹ Your wells do not qualify under any of the exemptions listed under 310 CMR 27.07, although it might be possible to modify the system so it could qualify. *See* 310 CMR 27.07(3).

First, based on evidence the Condo Trust's attorney provided to the town of Wakefield during the attempt to rescind the snow removal condition, the records show use of salts, ice melt chemicals, and sands, etc., while documents provided in response to discovery show the use of other contaminants on the property, i.e., fertilizers, etc. Interestingly, the minutes of the meetings from the Zoning Board of Appeals, which the Condo Trust attorney included in the application, mention Mr. Collins, the Town Engineer, did not want the roof leaders on the pavement so water from the roof is introduced into the catch basin, presumably because pollutants from the roof would end up in the injection wells, and quite likely, because the roof area was not accounted for in the design of the storm management system.

It is abundantly clear that pollutants have been and would likely continue to be introduced into the injection wells, a clear violation of 310 CMR 22.00. Second, because these injection wells cause infiltration of contaminated water into the LCR Realty Trust Property and the structure located there, causing mold, mildew and have caused the occupants to suffer allergies and other adverse effects, let alone substantial fears and concerns by the occupants regarding infiltration of other chemicals into the LCR Trust Property, exposing those who occupy it, the operation of the wells "adversely affects the health of persons" within the meaning of the regulations, and the operation of the Class V Injection wells on the Condo Trust property constitute a "prohibited activity" as defined under 310 CMR 27.04. The Trustees must take "Corrective Action" (*See* 310 CMR 27.10(2)), which includes remedial activities defined by 310 CMR 27.10, as follows:

- (1) Compliance with M.G.L. c.21E. Each person performing a remedial activity as part of an injection well closure shall perform such activity in accordance with M.G.L. c. 21E and 310 CMR 40.0000, the Massachusetts Contingency Plan (MCP).
- (2) Minimum Closure Requirements. Each owner or operator of a well that has been, or at any time may have been the subject of a violation of 310 CMR 27.04 shall at a minimum:
 - (a) prevent fluids from entering the injection well until:
 1. the well is eliminated and all inlets into the drainage system leading to the injection well are permanently sealed; or
 2. the well is authorized by and permitted in accordance with the Groundwater Discharge Permit Program, 314 CMR 5.00; or
 3. the discharge is connected to a municipal sanitary sewer line in accordance with 314 CMR 7.00; or
 4. the discharge is connected to a tight tank provided the connection complies with all applicable Department regulations; or

5. the discharge is addressed under a plan approved by the Department.

(b) assess all soil, gravel, sludge, liquids or other materials adjacent to the injection well and all components of the drainage system leading to the injection well;

(c) remove and dispose of any contaminated soil, gravel, sludge, liquids or other materials adjacent to the injection well and all contaminated components of the drainage system leading to the injection well in accordance with all federal, state and local requirements; and

(d) permanently plug all inlets to the injection well, unless the injection well is closed accordance with 310 CMR 27.10(2)(a); and

(e) 30 days prior to closure, submit to the Department a UIC Class V Well Pre-Closure Notification Form available from the Department, and

(f) within seven days following completion of closure of the injection well, submit to the Department documentation of closure on a UIC Notification Form available from the Department; and

(g) prior to sealing each floor drain, submit to the Department, a completed Form WSI, Notice of Plumbing Inspector Approval to Seal Floor Drain.

- (3) Additional Closure Activities. If the Department determines that it is likely that there has been movement of injection or formation fluids into underground sources of drinking water or a release or threat of release of oil and/or hazardous material to the environment through an injection well the Department may require any additional closure measures it deems necessary for corrective action and preservation of the Underground Source of Drinking Water.

310 CMR 27.10

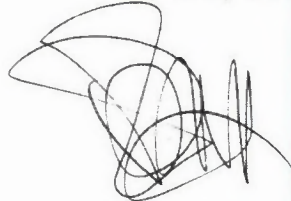
The LCR Realty Trust Property has been damaged since the Condo Trust has failed to comply with the Agreement.

WHEREFORE, this letter demands \$100,000 in damages, and second, this letter full compliance with all local, state, and federal laws within 90 days. Please provide me with notice of your intent to become compliant within ten days and confirmation of compliance before the expiration of 90 days. Should you fail to comply with this demand within the requisite time, the claims noted above may be brought against you, including claims arising under the Clean and Safe Drinking Water Acts for (i) illegal construction of a Class V Injection Well without having submitted inventory information to the UIC regulating authority, i.e., MassDEP and EPA; (ii) failure to comply with UIC program requirements, and for illegal operation of an Injection Well having potential of carrying pollutants to the waters of the United States, without a permit, in violation of federally regulated water quality standards; and (iii) other potential violations of the CWA,

including violations arising from the Condo Trust's failure to follow EPA and MassDEP compliance procedures with respect to the building, operating, management, or maintenance of Class V Injection wells, and a failure to monitor, stop, prevent, mitigate or report pollution and/or the potential of pollution from the Class V Injection well.

Be advised that because the Condo Trust has already been put on 90-day notice, and is thus fully aware that the wells operates illegally, yet refused to discontinue operation and use of the wells, instead claiming Doane is barred from bringing a claim to compel compliance, the Condo Trust's violations of state and federal law are beyond negligence, but rather, they are entirely intentional and knowing. "Negligent" or "knowing" discharges subject those responsible to criminal penalties and enforcement pursuant to 33 U.S.C. § 1319(c). Each day of unimpeded discharge comprises a series of separate violations. CWA, § 309(d) provides up to a \$25,000 per day fine for each.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Robert A. Doane', with a stylized, looping flourish at the end.

Robert A. Doane
Trustee of the LCR Realty Trust

cc: **Administrator**
US Environmental Protection Agency Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Regional Administrator
US Environmental Protection Agency
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Commissioner
MassDEP
One Winter Street
Boston, MA 02108

Kenneth Pelletier
MassDEP
One Winter Street
Boston, MA 02108

